No. 62

UNITED STATES

Circuit Court of Appeals.

October Term, 1892.

TYLER MINING COMPANY,
Plaintiff in Error,
vs.
CHARLES SWEENEY, et al.
Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR

W. B. HEYBURN,
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STATEMENT OF THE CASE.

The statement of the case contained in plaintiff's brief on page four, that, "After the Tyler had withdrawn its answer it abandoned 427 feet of the east end of its original claim," is not borne out by the facts as they appear in the transcript. There is no evidence that any abandonment was ever filed or formulated by the company of any portion of ground originally applied for, which was 1500 feet in length. It does appear from the transcript, pages 226 and 227, that a portion of the ground originally applied for, as the Tyler

lode claim, was adjudged to belong to the Last Chance claim. It is true that it appears, in transcript page 86, that an application to purchase was made, by an attorney of the Tyler Mining Company, for a portion of the Tyler claim, indicated by a map certified to by one F. C. Loring, inserted in transcript at page 74. The Tyler Mining Company never made application for patent for a piece of ground corresponding to that sued for in this action.

The fact, as shown by the diagram at page two of plaintiff's brief, taken in connection with the admitted facts, that the portion shown by such diagram to be in conflict with the Last Chance claim never belonged to the Tyler claim, leaves the Tyler claim a five sided figure, and shows that the ledge illustrated in said diagram, does not pass through parellel end lines. The effect of this will be argued later.

ARGUMENT.

Plaintiff has not seen fit to urge any argument in support of its first assignment of error, which is to the admission in evidence of plaintiff's exhibit No. 6. We do not find any such exhibit in the transcript, or reference to any in the index thereof. It is evident that the assignment of error is erroneous.

The second assignment of error, upon which the plaintiff relies, is as to the admission in evidence of defendant's exhibit No. 7, which is found in the transcript from page 220 to page 228, and is a certified copy of the judgement roll of the District Court of the First Judicial District of Idaho, in and for Shoshone County, in a suit in said court between the Last Chance Mining Company and the Tyler Mining Company, which was brought in support of an adverse claim filed by the Last Chance Mining Company against the Tyler Mining Company in the land office at Cœur d'Alene, Idaho, wherein an application for patent had been made by the Tyler Mining Company for the Tyler lode claim, which is the same mining claim upon which the plaintiff claims in this action.

It appears from said judgment roll on page 220 that the plaintiff alleged in its complaint that it was at that time and since the 17th day of September, 1885, had been the owner of and entitled to the possession of the Last Chance mining claim, as described in the complaint, by virtue of a valid location thereof made on the 17th day of September, 1885. It further appears from said judgment roll, transcript page 226, that on the 27th of June, 1890, the court rendered the following judgement:

"In the District Court of the First Judicial District of Idaho Territory, in and for Shoshone County.

The Last Chance Mining Company, Plaintiff, vs. The Tyler Mining Company, Defendant. } Judgment.

This cause coming on regularly for trial on the 27th day of June, A. D. 1890, Messrs. Woods & Heyburn appearing as counsel for plaintiff and the defendant having withdrawn its appearance and its answer heretofore, filed the cause, being an action based on an adverse claim filed by plaintiff against an application for a patent by the defendant for a mining claim known as the "Tyler," made on April 19th, 1887, and the party plaintiff being required by law to prove its claim to the ground in controversy good as against the government of the United States, to the mining ground in controversy, the same being a part of the "Last Chance" mining claim. The cause was tried before the court, sitting without a jury; whereupon witnesses on the part of the plaintiff were duly sworn and examined and certain documentary evidence was introduced, and the evidence being closed, the case was submitted to the court for consideration and decision, and after due deliberation thereon the court files its findings and decisions in writing, and orders that judgment be entered herein in favor of the plaintiff for the relief prayed for in the complaint herein.

Wherefore, by reason of the law and the premises aforesaid, it is ordered, adjudged and decreed that the Last Chance Mining Company, the plaintiff above named, is the owner of, and by virtue of a valid location of a mining claim called the Last Chance, made on the (17th) seventeenth day of Septem-

ber A. D. 1885, by John Flaherty, J. L. Smith, M. Carlin and John M. Burke, is entitled to the possession, and right of possession of all that piece or portion of said mining claim in the complaint herein described as follows, viz: Beginning at a point on the north line of the Last Chance mining claim where the same is intersected by the westerly side line of the Tyler lode claim as shown by the official survey of the respective claims. Thence south 54° 32′ east 426.50 feet to the corner number 4 of the official survey of said Tyler mining claim; thence north 19° 40′ east 285 feet to the point where said course and distance intersects with the said north side line of the Last Chance mining claim as officially surveyed; thence along said northerly side line of the Last Chance claim, south 87° 18′ west 443.28 feet to the place of beginning, containing an area of 1.474 acres of ground and that the plaintiff do have and recover the possession, and right of possession of said premises from the defendant, the Tyler Mining Company."

Judgment given and recorded July, A. D. 1890.

WILLIS SWEET, Judge."

The proceedings under which this judgment roll was offered and received in evidence appear on page 232 of the transcript, but, through some mistake in arranging the transcript, they are inserted in the wrong place.

The assignment of error, based upon the admission of defendant's said exhibit No. 7, is discussed in plaintiff's brief on page 25, and is first attacked on the ground that it is a nullity for the reason that the withdrawal of the appearance and answer of the Tyler Mining Company in that case left no issue to try. In reply to this we cite the court to the provisions of the act of March 3rd, 1881, (21st Statutes, 505,) which provides that in actions brought under the provisions of Section 2326 of the Revised Statutes of the United States, where the title should not be established by either party the jury shall so find, and judgment be entered accordingly, without costs.

The United States Supreme Court, in interpreting this statue in the case of Gwilliam vs. Donellan, 115 U. S. 45, says that the adverse claimant, who is the plaintiff, must

show a location which entitles him to possession against the United States as well as against the other claimant.

In suits brought in support of adverse claim, under Section 2326, there are three parties to the proceedings; the government upon the one side, who is the seller, and the purchasers, plaintiff and defendant. The action is brought to determine who has the right of possession. Each party must rely upon the strength of his own title and not upon the weakness of the other, and by the provisions of the act of March 3rd, 1881, the jury can find for either the plaintiff or defendant, or against both:

Jackson vs. Robie, 109 U. S. 440.

When neither party establish title to the ground in controversy, judgment cannot be for either party, and the suit must be dismissed. And if neither party establish such a right the jury is required to find this fact.

An adverse suit having been filed in the land office, and the proceedings stayed, pending its determination, the protestant having commenced suit in support of his adverse claim was required to file a judgment roll in the land office before he could be entitled to patent the ground in controversy, and was entitled to a judgment, notwithstanding the fact that the defendant withdrew its answer and allowed a judgment to go by default.

In order for the plaintiff, in that action, to recover the piece of ground in controversy it was necessary to show a valid location of a mining claim including the ground in controversy. In the complaint it was alleged that the location was made on the 17th of September, 1885, that the acts, which constituted the location, were performed on that day. Plaintiff did so show to the court, and on that showing the judgment was rendered. We submit that this was conclusive of the fact stated in the judgment.

It is argued, by the plaintiff in error, that this was not a fact necessary to be found, and, therefore, the judgment is not conclusive of the fact found.

The doctrine laid down in Black on Judgments, Vol. 1,

Sec. 87, is as follows: "A judgment taken by default is conclusive by way of estopple in respect to such matters and facts as were well pleaded and properly raised and material to the case made by the declaration or other pleadings, and such issues cannot be relitigated in any subsequent action between the parties or their privies." And further: "That a judgment by default is as conclusive upon the judgment defendant as to any matter admitted by default and adjudicated by the judgment which ensued, as any other form of judgment."

It is not true that the subject-matter of that suit was different, or involved any different question than that sought to be adjudicated by the plaintiff. The question in that case was as to the validity of the Last Chance and Tyler mining claims, and the ground in controversy, which was a part of the Last Chance claim. The plaintiff claims to be the owner of it, by virtue of a location made on the 17th day of September, and the defendants claim to be the owners of it by virtue of a location made on the 19th day of September. The defendants withdrew their answer, thereby confessing that the plaintiff was entitled to recover under the allegations of its complaint. The plaintiff was entitled to recover, if at all, by reason of the location pleaded and did so recover. The parties are the same in law and a judgment in contemplation of law is between the same parties. The ultimate fact adjudicated was as to the validity of the two locations pleaded, which necessarily involved the question of priority of location.

On page 27 of plaintiff's brief it is urged that the plaintiff can have no relief beyond that demanded in its complaint, and an Idaho statute is cited. We will admit the doctrine to be true, still the plaintiff was granted no more relief than demanded in its complaint.

The case of Cromwell vs. the County of Sac, 94 U. S. 356, does not cover the case at bar. In that case it was sought to make the allegation of the declaration evidence in an action upon an entirely different claim. In this case the only question sought to be reopened was the identical question settled in the judgment, namely, the priority of location. In the last paragraph on page 28 of plaintiff's brief it is

stated that the effect of the ruling of the court below was not only to decide that the Last Chance was the owner of the little triangular piece of ground, but to determine, for all time, between these parties, that the Last Chance location was made prior to the Tyler location. This statement is correct, because the ownership of this triangular piece of ground could only be determined by determining the question of priority of location. The location was either valid, as to all of the ground, under the circumstances, or as to none of it. The rule in ejectment stated on page 29 of plaintiff's brief has no application to adverse suits under section 2326.

The Rev. Statutes, Sec. 2324, requires that every location notice when recorded shall contain the date of location, and in adjudicating the question, as to the validity of the location, it inevitably follows that the date of the location must be found and determined by the court, as was done in the case of the Last Chance location. That, therefore, was a necessary question to be determined by the court in rendering judgment on the validity of the Last Chance's location, and is, therefore, conclusive of the fact.

It cannot be said that the date of a location was incidental or collateral in a question involving the validity of the location, because the location must have been determined to have been made at a given time.

The record of a judgment cannot be contradicted. The averments or disclosures of the record, in respect to the matter decided, cannot be shown by any extraneous evidence when it is apparent, on the face of the proceedings, in the former action, that the question in controversy was litigated therein, the mere production of the record will be sufficient.

Lander vs. Arno, 65 Me. 28,

Second Smith's Leading Cases, 668,

Campbell vs. Butts, 3 N. Y. 173.

It was sought to defeat the effect of this judgment, first, by showing, by parol, that there was an agreement made at the time of the entry of the judgment as to its effect. (Transcript page 298.) This the court refused to allow, and we deem it unnecessary to cite authorities in support of the

proposition that the terms of a judgment could not be varied by parol. It was further sought to defeat the effect of this judgment by testimony as to the date of the location of the Last Chance claim. (Transcript page 299.) This the court refused to allow. Defendants then made repeated efforts, with a view of showing that the Last Chance claim was junior to the Tyler, in order to overcome the decision of the court that the Last Chance claim being shown to be prior in point of location to the Tyler that the Tyler had no extra-lateral rights to the vein on its dip within the lines of the Last Chance claim, following the doctrine laid down in the Argentine Mining Co. vs. the Terrible, 122 U. S. 478.

There were but three legal propositions controlling this case.

First. Could the plaintiff follow the vein outside of its lines at all, owing to the fact that it had not parallel end lines.

Second. The priority of the location of the Last Chance, which was established by the introduction of the judgment of the court above referred to.

Third. The right of a junior locator having the apex of a vein, to follow that vein on its dip within the lines of a senior locator having a valid location upon the same vein.

The first legal proposition, arising from the standpoint of the defendant in error, we think is conclusive of this case, and eliminates every other question from it, namely, the right of the plaintiff to follow its vein, assuming that it has one, on its dip outside of its side lines at all.

Defendant in error contends the Tyler mining claim is a five sided figure and has no parallel end lines. The diagram on page two of plaintiff's brief will sufficiently illustrate this proposition for the purposes of argument. The Tyler claim, as shown on that diagram, by the exterior lines, is a four sided figure with a corner projected into the Last Chance lines, but, under the decision in the case of Montana Company vs. Clark, 42 Fed. 626, taken together with the

judgment above referred to, the Tyler never did own that corner projecting into the Last Chance ground, nor was that portion of the claim ever a part of, or included within the location of the Tyler claim. Therefore the north side line of the Last Chance claim constituted one line of the Tyler claim, thus making it a five sided figure with the vein, according to the showing of plaintiff's diagram, passing through one side and out one end of the claim.

Under the decision of the Iron Silver Mining Company vs. Elgin Mining Company, 118 U. S. 196, such a location gives the locator no extra-lateral rights. While it does not affect the validity of the location, it confines the locator to the lines of the location.

In the case at bar it appears that the Tyler Mining Company made an abortive attempt to readjust its lines, in order that it might secure to itself extra-lateral rights. This effort consisted in the Tyler Mining Company, after the Last Chance Mining Company had obtained a judgment for the ground in controversy, attempting to draw its southerly end line back a distance of 427 feet, thus attempting to carve out an entirely new and enlarged estate for itself to the prejudice of its neighbor, and to confer upon the Tyler owners new rights, which, in any event, would be subject to intervening rights of other parties.

But instead of filing an abandonment, or making an amended or new location of the Tyler claim, to accomplish this object they procured one Frank C. Loring, a United States Deputy Mineral Surveyor, to draw a plat of a claim, as shown on page 74 of the transcript, and attach a certificate thereto, and call it an official survey, and attach this plat to an affidavit made by one W. B. Honeyman, manager of the Tyler Mining Company, found in transcript on page 85, together with an application to purchase signed by the Tyler Mining Company by Albert Hagan, its attorney, and filed these papers in the United States Land Office at Cœur d'Alene where there was already on file an application for patent of the Tyler Mining claim, as originally surveyed, as will appear by the transcript on page 83. Whereupon the register of the land office issued his receipts for the payment for that portion of the Tyler claim.

The court will take notice of the fact that the survey upon which an application for patent for a mining claim may be based must be ordered to be made by the Surveyor General, and when made the plat and field notes of such survey must be approved by the Surveyor General, and not until this is done, together with the other steps prescribed by the regulations of the department, is the register authorized to allow the entry and issue the receipt.

In this case it appears upon the face of the papers of the plaintiff that the register's receipt was issued without authority, and should not have been received in evidence. And it is also clear that the making of the line upon the paper by the deputy surveyor, without authority, can cut no figure in determining the right of the Tyler Company to follow its vein, if it has one, outside of its side lines. The only claim upon which the plaintiff can stand in court at all is the five sided figure above described. And taking the plaintiff's statement for it, as contained in the diagram on page two of its brief, it had no extra-lateral rights and could not recover against the Last Chance Mining Company or the Republican Mining Company, the owner of the Republican Fraction claim in possession of their respective claims.

It was necessary, first, for the plaintiff to establish the fact that it had such a mining location and such a vein therein as entitled it, under the law, to extra-lateral rights in following its vein, if it had one, on its dip outside of its lines before the necessity arose to enquire into either the title or the existence of the Last Chance or Republican Fraction claims.

That it had no such right is clearly established by the doctrine laid down in the case above cited of the Iron Silver Mining Company vs. Elgin Mining Company, 118 U. S. 196, and in the case of the Montana Company, Limited, vs. Clark, 42 Fed. 626, and the cases therein cited and referred to.

If we are correct in this, it disposes of the writ of error in this case. It matters not, in that event, whether the instructions given by the court be correct or not, or whether the court's rulings, as to the admissibility of testimony, are correct or not. The court should have instructed the jury,

when the plaintiff closed its case, to find for the defendants, without compelling the defendants to present their case. The question of priority then would have been immaterial.

Plaintiff relies very largely upon the case of King vs. the the Amy Silversmith Mining Company, 24 Pac. 200. This is a decision of the Supreme Court of Montana, and it is not at all in harmony with the decision of the Supreme Court of the United States in the cases cited, or of the United States Circuit Court for the District of Montana, and, furthermore, does not support the contention of plaintiff in error.

Several of the plaintiff's requests, which were refused by the court, were to the effect that the question of priority of location was immaterial, as between a party having the apex of the vein within its lines and one whose location was made prior thereto on the dip of the lode as it descended into the earth.

The defendants urge the court to hold that a location made upon the dip of a lode, prior to a location on the apex of the same lode, could prevent the claim having the apex from following its vein on the dip under the prior location.

We maintain that this is the doctrine established in the case of the Argentine Mining Company vs. the Terrible Co., 122 U. S. 487.

The plaintiff contends that the case of Tarbot vs. the Flagstaff Mining Company, 99 U. S. gives the junior locator, having the apex, the right to follow his vein under and into the premises of the senior locator on the dip.

The Argentine case is the latest decision of the Supreme Court of the United States on this subject, and is squarely in point, that being one of the questions to be expressly considered by the court.

The statement upon which the plaintiff relies in the Flagstaff cases is mere dicta, and was not an issue, if it can be said that the court did so decide at all.

The diagram contained in plaintiff's brief at page 46, does not convey an intelligent idea of the facts upon which

the Argentine case was decided, and defendant's counsel will ask on argument to refer to the Government's publication from which the diagram in the brief purports to have been taken for the purposes of argument. We will refer to this question later in considering the instructions of the court.

With reference to the proposition argued by plaintiff, as to the side lines of a claim becoming end lines, in the event of the claim being laid across the ledge, the question is so well settled that there can be no room for argument as to what the law is.

If the Last Chance claim is found to be located across the ledge, instead of along it, then the Last Chance claims' rights, as to the length on the ledge, are limited by the side lines, and it is not necessary, for the purposes of this case, to enquire as to what defendant's extra-lateral rights would be.

It is not contended that the trespass alleged to have been committed was outside of the lines of the Last Chance claim, extended downward vertically, and we are thus relieved of the necessity of stating what the Last Chance's rights may be in the future, outside of those lines.

We contend that the court should have instructed the jury that the plaintiff was not entitled to recover as against either the Last Chance or the Republican Mining Company for the reasons above alleged, that it had no right to go outside of its lines at all.

The objection of the plaintiff in error to the admission of the register's receipt and final certificate of entry of the Last Chance claim, without first introducing evidence to show the validity of the location is, we submit, without point. It has been repeatedly decided, by the Supreme Court of the United States, that the land department of the United States acts by authority, and that its official act, when done by authority can not be attacked collaterally:

Steele vs. Smelting Company, 106 U. S. 450.

A register's receipt and certificate of final entry was evidence in itself of the performance of all the acts made

necessary by the law and the regulations of the department, in order to obtain such certificate, and where the entry has been made and the certificate given it is not necessary nor proper to go behind that certificate to determine whether or not the preliminary steps, leading up to its issuance, have been taken.

Black on Judgments, Vol. 2, Sec. 530, and cases cited thereunder.

The defendant did not "assume" that a lode had been discovered, but it satisfied the land department that a lode had been discovered and a claim had been properly located before that department issued the certificate of final entry.

The certificate of final entry and the register's receipt performs the same function for the purpose of establishing title as the patent itself.

After entry in the land office, although the title is still equitable in its nature it amounts practically to a title of fee simple, because the land office receipt for purchase money is made evidence of title.

Plaintiff in error in its brief, page 37, says, that the object of this line of defense, referring to the introduction of the certificate of final entry, is apparent, and that we do so well knowing that the plaintiff was prepared to show that the Last Chance location was not, in fact, made until after the Tyler, and that when it was made it was done without any discovery, etc.

We submit that there was a day in court upon which the plaintiff in error might have raised these questions, namely, on the day on which it withdrew its answer in the District Court where the adverse suit was pending. Instead of making good these statements at that time it confessed the validity of the Last Chance's title and the regularity of all of its proceedings leading up to title, by retreating and withdrawing its answer. It cannot now be heard to say that it might have proven these allegations.

We admit that to entitle a locator to hold a mining

claim he should show that he has complied with the conditions of the mining law, as stated in the brief of the plaintiff in error on page 38, and we assert, in reply thereto, that we did show these facts to a court of competent jurisdiction, and were adjudged to have complied with the conditions of the mining law, as appears in the trsnscript, page 226.

When a party has established these facts once in a court of competent jurisdiction, and has obtained the judgment of the court to that effect, that judgment speaks for him thereafter whenever the question of the title is raised against him, and is conclusive of the fact.

We think this disposes of all of the assignments of error that have any bearing upon this case, discussed in the brief of the plaintiff in error up to page 40.

The 36th assignment of error is based upon an attempt of the plaintiff to take judgment against the parties who had been made parties to the action in the bill, and who disclaim having any interest in the subject-matter of the controversy.

We do not think this needs any discussion. A party, who disclaims having any interest and whom it is not claimed was shown to have any, should certainly not have judgment rendered against him either for the damage claimed or costs of suit. We are unable to see the application of the doctrine of the cases cited to the condition of facts shown to have existed in this case.

While no appeal is now before the court, on behalf of the Republican Mining Company from the action of the court setting aside the verdict, as to that company, yet we respectfully submit that the court erred in so doing for the reasons that, according to the evidence the Republican Fraction mining claim, owned by this company, was outside of the lines of the Tyler, and was located before any attempt, on the part of the Tyler to change its lines, or to establish a new end line, that would enable it, even though it had the right so to do, to pass out of its own lines into that of the Republican Fraction. We only suggest this proposition in

reply to the second paragraph on page 41 of the brief of the plaintiff in error.

It was error, if error at all, in favor of the plaintiff, and they can take no advantage of it.

We think that the statement in the first paragraph of the plaintiff's brief, page 42, is unfair to the court that tried the case, inasmuch as the court allowed the plaintiff below to introduce its certificate of final entry.

The certificate of final entry of the Last Chance claim, offered by the defendant in error upon the trial, together with the judgment of the court, as to the validity and the time of location, establishes the whole title of the defendant in error to the Last Chance claim, as dated from the 17th day of September, 1885, while the certificate of entry of the Tyler claim, taken in connection with the proofs, offered by the plaintiff in error upon the trial below, establish the date of the Tyler location and the title of plaintiff in error therein as of the 19th day of September, 1885. These records and proofs fix the relative questions of priority of title.

It is admitted and shown by the exhibits and proofs of the plaintiff in error that the Last Chance mining claim has a large ledge extending entirely across its location, at least, if not throughout its whole length, that crops upon the surface, and plaintiff in error admits that it is the same ledge upon which the Tyler was located. These facts being shown or admitted were conclusive against the plaintiff in error upon its right to enter within the lines of the Last Chance claim under the doctrine laid down in the case heretofore cited of the Argentine Mining Company vs. the Terible Mining Company, 122 U. S. 478.

The fact that the lode existing and cropping upon the Last Chance claim is the same lode as is found within the Tyler lines is admitted by the plaintiff in error on page 43 of the brief in the second paragraph.

We challenge the application of the doctrine of the Iron Silver Mining Company vs. the Elgin Company, 118 U. S. 196, as stated on page 45 of the brief of the plaintiffs in

error. That case, more specifically than any other reported, defines the function of the end lines of a mining claim. We are aided in interpreting it by diagrams adopted by the United States Supreme Court, which leave no doubt as to the axact application of the principle.

Referring to Section 2322 of the Revised Statutes, under which the right to follow a vein between end lines on the dip the court says: "This section appears sufficiently clear on its face. There is no patent or latent ambiguity in it. The locators have the exclusive right of possession and enjoyment of all the surface included within the lines of their location, and the location by another section must be distinctly marked on the ground so that its boundaries can be readily traced. Rev. St. Section 2324. They have also the exclusive right of possession and enjoyment of all the veins, lodes and ledges throughout their entire depth, the ~~dip~~ or apex of which lies inside of such surface lines, extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. The surface side lines, extended downward vertically, determine the extent of the claim, except when in its descent the vein passes outside of them, and the outside portions are to lie between vertical planes drawn downward through the end lines. This means the end lines of the surface location, for all locations ~~may~~ be measured on the surface.

The difficulty arising from the section grows out of its application to claims where the course of the vein is so varied from a straight line that the end lines of the surface locations are not parallel, or, if so, are not at right angles to the course of the vein. This difficulty must often occur where the lines of the surface location are made to control the direction of the vertical planes. The remedy must be found, until the statute is changed, in carefully making the location and in postponing the marking of its boundaries, until exploration can be made to ascertain, as nearly as possible, the course and direction of the vein." * * * * "Even then, with all the care possible, the end lines marked on the surface will often vary greatly from a right angle to the true course of the vein. But whatever inconvenience or hardship may thus happen it is better that the boundary planes should be defi-

nitely determined by the lines of the surface location than that they should be subject to perpetual readjustment according to subterranean developments made in mine working. Such readjustment, at every discovery of a change in the course of a vein, would create great uncertainty in titles to mining claims. The rule, whatever hardship it may work in particular cases. should be settled, and thus prevent, as far as practicable, such uncertainty. If the first locator will not, or cannot make the explorations necessary to ascertain the true course of the vein, and draws his end lines ignorantly, he must bear the consequences. He can only assert a lateral right to so much of his vein as lies between vertical planes drawn through those lines. Junior locators will not be prejudiced thereby, though subsequent explorations may show that he erred in his location. * * * *

Under the act of 1866, parallelism in the end lines of a surface location was not required · but when location has been made since the act of 1872, such parallelism is essential to the existence of any right in the locator or patentee to follow his vein outside of the vertical planes drawn through the side lines. His lateral rights, by the statute, is confined to such portion of the vein as lies between such planes drawn through the end lines, and extended in their own direction, that is, between parallel vertical planes. It can embrace no other portion. The exterior lines of the Stone claim form a curved figure somewhat in the shape of a horseshoe, and its end lines are not and cannot be made parallel. What are marked on the plat as end lines are not such. The one between numbers five and six is a side line. The draughtsman or surveyor seems to have hit upon two parallel lines in his nine-sided figure, and apparently for no other reason than that their parallelism called them end lines.

We are, therefore, of the opinion that the objection that, by reason of the surface form of the Stone claim the defendant could not follow the lode existing there in its downward course, beyond the lines of the claim, was well taken to the offered proof."

The shape of the lode as shown in the diagram accompanying this decision, is not unlike the shape of the lode

shown in the diagram on page two of the brief of the plaintiff in error.

Both in the case last cited, and in the Flagstaff case the court holds that the end lines of the claim are those that cross the lode, and applying this doctrine to the Tyler claim the line along the northerly side of the Last Chance claim would be the one end line of the Tyler claim, and what is marked upon the plat as the northerly end line would be the other. The course of one of these lines is north 87°, 18′ east. The course of the other is north 19°, 40′ east.

The original south end line of the Tyler did not cross or even touch the lode as shown by plaintiff's plat.

The line claimed as the southerly end line of the Tyler upon the diagram on page two of the brief, which is the intermediate line crossing the figure, has no legal existence. The drawing of that line upon the plat by Mr. Loring, the draughtsman, could not give it any legal existence, it having been no part or line in the original location, and never marked on the ground until after the beginning of this suit.

That this interpretation of the decision in the 118 is correct, and that the application of it to this case is correct is further established by the decision of Judge Knowles in the United States Circuit Court in the case of the Montana Co. vs. Clark, 42 Fed. 628, where the court says: "The plaintiffs present the point for consideration that the allegations of defendants in their answer show that the Hopeful claim has no parallel end lines. The answer of the defendant does show that their claim is in the form of an isosceles triangle. A triangle has but three sides and no two of these can be parallel to each other. The question is here presented of the right of the defendants to follow on the dip on their lode into the Marble Heart claim, through its side lines. This point was settled in the case of the Iron Silver Mining Company vs. the Elgin Mining & S. Company, 118 U. S. 208, 6th, Supreme Court, Rpts. 1176. In that case the United States Supreme Court uses this language:

'Under the act of 1866 (14 St. 251) parallelism of the end lines of a surface location was not required, but where a

location has been made since the act of 1872, such parallelism is essential to the existence of any right in the locator or patentee to follow his vein outside of the vertical planes drawn through the side lines. His lateral right by the statute is confined to such portion of the vein as lies between such planes drawn through the end lines, and extended in their own direction, that is, between parallel vertical planes. It can embrace no other.'

This language is decisive of the defendants' right to follow their vein outside of their side lines; having no parallel end lines they cannot do it.

The defendants urge that they located the Hopeful claim in such a way as to have parallel end lines. There is nothing in the pleadings to show this, and if there was I do not think they could maintain this position.

According to the statement made by counsel it appears the defendants did claim a piece of ground which had parallel end lines when they made their location, but it further appears that they set their stakes upon the premises of plaintiff and claimed some of its ground. When compelled to relinquish what they claimed, which belonged to plaintiff, they had no north end line, and their claim assumed the form of an isosceles triangle. The defendant could locate only what was subject to location, no matter what they claimed."

This decision exactly fits the case of the plaintiff in error. Defendant originally located a claim having parallel end lines, but, in order to make them parallell, they set the south east corner stake over on the Last Chance claim, which was a prior location, and which they afterwards abandoned all claim to, leaving their claim a five sided figure, and it was not until the 1st of February, 1888, more than two years and four months afterwards, that they attempted to change the shape of the claim, and then they did it only on paper in an irresponsible manner, not recognized by law, by drawing a line on a map, which they filed in the land office.

No amended survey was made, no attempt was made to amend the location, no new stakes were set on the ground,

no application was made to the Surveyor General for an order for an amended survey, but a surveyor, without authority of law, and in violation of law, attempted to perform the function of the Surveyor General by certifying a plat in the land office, and the land officers in ignorance of their duty, allowed a final entry to be made on such showing.

This surveyor testifies, on page 69 of the transcript, that he made the first survey of this new end line on the 11th of August, 1891, which was three days after the complaint in this action was sworn to, and testifies, that the survey that he made on the ground has not been approved by the Surveyor General, nor filed by him anywhere; that he has not presented the survey, or amended survey, as he calls it, for approval, because he was told to hold it temporarily by the Tyler Mining Company. So that, for the purposes of this suit, the Tyler mining claim, so far as its shape is concerned, and the course of its lines, must stand as a five sided figure with the vein passing through end lines that are neither parallel nor substantially parallel.

That being the case, as we have said before, the Tyler claim has no extra-lateral rights.

This disposes of that portion of the brief of the plaintiff in error on pages 45 and 46.

Passing to the argument on page 47 of the brief of the plaintiff in error, as to the application of the principles of the case of the Argentine Mining Company vs. the Terrible, 122 U. S. 478, we find a plat inserted in the brief intending to represent the facts upon which that case was decided.

We have already discussed this question as applied to the admission of evidence, but as applied to the instructions would further say that the question therein decided was as to whether a junior locator on the top or apex of a vein in following its vein on the dip outside of its surface lines could pass into a senior location upon the same vein, which was made by sinking a shaft and striking that vein upon its dip.

In passing upon this question Mr. Justice Field says, in

the beginning of the decision: "The instructions as requested by the defendant, as a proposition of law, is undoubtedly sound. It is substantially a brief repetition of the language of the statute. Its refusal, however, did not prejudice the defendant, for a valid location, as defined by the court, could only be found in favor of the plaintiff in case the vein discovered by the locators of the Adelaide claim extended to the ground in dispute. If such were the fact, the principle involved in the instructions asked, applied to that claim, cut off the right asserted by the defendant. If there was an apex or outcropping of the same vein, within the surface boundaries of the claim, of the defendants, *that company could not extend its workings under the Adelaide location, that being of earlier date.*

Assuming that on the same vein there were surface outcroppings, within the boundaries of both claims, the one first located necessarily carried the right of working the vein."

The instruction asked, which was under consideration, was as follows: "The law provides that upon a location properly made the claimant shall have the vein upon which the location is made, and all other veins and lodes having their top or apex in the territory within the lines of the location, and not only within the body of the claim, within the lines of the location, but beyond those lines as far as the vein or lode may, in its descent into the earth, pass beyond these lines, and within the end lines of the location. The defendant here claims that the lode in controversy originates in its patented territory by its top or apex, and descends upon its dip through and under the ground in controversy.

If from the preponderance of evidence you believe that the top or apex of the lode in controversy does, in fact, originate within the patented territory of the defendant, and descends upon its dip into the ground in controversy, your verdict should be for the defendant."

The court refused to give this instruction, and instructed the jury, in substance, that if they believed that the Adelaide claim was a valid location prior, in point of date to the Camp Bird, even though the Camp Bird might have the apex of

the lode yet it could not follow that lode on its dip through a prior location made upon the dip of the lode.

It does not seem to us that there is any ambiguity or anything difficult to understand about this decision. It is not in entire harmony with the dicta of the court in the Flagstaff case, but is a much later decision, and the point was directly at issue in this case and squarely decided.

The only application that this principle has to the case at bar arises, if the court should find that the Tyler claim's end lines were such as to entitle it to pass out of its side lines, under any circumstances.

As we have already stated, should the court hold with us, that the Tyler's end lines not being parallel, it could not pass out of its side lines on the dip of the vein, it will not be necessary to consider the principle involved in the Argentine case, or the question of priority of title, or the title of the Last Chance claim, under any circumstances.

The court left several questions to the jury to be determined as to the dip of the lode, its width, etc., which we believe should not have been given to them, but if that was error, it was not prejudicial to the plaintiff in error.

The court did instruct the jury, on the question of the right of a party to follow its lode outside of its lines (on pages 43 and 44) that the law does not limit the miner to the *true dip* of his ledge; that he is not bound to follow down on its *true dip*.

While we are unable to agree with the court on this question, yet the error, if error it was, was in favor of the plaintiff.

The court, on page 44, says, that the only reasonable rule would seem to be that a line half way between the true dip and the true course should be the dividing line between the downward and the longitudinal course.

While we are unable to agree with the court on this question, yet, if it was error, it was favorable to the plaintiff.

In reference to the general observations, commencing on page 50 of the brief of plaintiff in error, we can only say that the questions therein referred to are all discussed in the body of the brief, and we have dealt with them in detail.

The burden of these general observations by the plaintiff seems to be that the United States Supreme and Circuit Courts are either wrong or have failed to express themselves squarely and distinctly, and that this court should follow rather the decisions of the Supreme Court of Utah and of Montana, which plaintiff in error believes are more favorable to his cause.

The facts of this case were submitted to the jury and the jury passed upon them. I take it that in a case of this kind the court will not attempt to review the facts.

All of the contention, as to the width of the lode between plaintiff and defendant, was forced upon defendant by the fact that the court, at that time, had not reached a conclusion upon the law he afterward gave to the jury, and in view of the uncertainty always existing, as to what view the court might take of the law, the defendant was compelled to inject into this case very much testimony as to width, and character of the lode, that in the light of law given to the jury by the court was unnecessary for the determination of the issues of the cause.

We submit that there is no error in the record to justify this court in reversing the judgment of the court below.

Respectfully Submitted,

W. B. HEYBURN,

Solicitor for Defendant in Error.